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ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

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Hong Kong



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With over 7.4 million people of various nationalities in a 1,104-square-kilometre (426 sq. mi.) territory, Hong Kong is one of the most densely populated places in the world. As a special administrative region, Hong Kong still maintains separate governing and economic systems from that of Mainland China under the principle of “one country, two systems”. As one of the world’s leading international financial centres, Hong Kong has a major capitalist service economy characterised by low taxation and free trade, and the Hong Kong dollar is the eighth most traded currency in the world. (The territory’s 2,755 km² (1,064 sq. mi.) area consists of Hong Kong Island, the Kowloon Peninsula, the New Territories, Lantau Island, and over 200 other islands.)

Within this legal and economic framework, Hong Kong has become and still looks to be a hotbed for bank and cyber frauds and other financial, white-collar crime.

We look to discuss the legal framework that exists to assist a ‘victim’ of such white-collar crime to see what help is available to seek redress.

1 Key legal and statutory framework used in Hong Kong to pursue fraud, asset tracing and recovery cases

Hong Kong has a variety of legislation which

provides for criminal offences relating to fraud.

The primary legislation for the main offences relating to fraud are the Crimes Ordinance (Cap. 200) (CO) and the Theft Ordinance (Cap. 210) (TO). These include:

- i. fraud under section 16A of the TO;
 - ii. conspiracy to defraud under section 159E(2) of the CO;
 - iii. the basic definition of theft under sections 2 and 9 of the TO;
 - iv. offences involving deception, such as obtaining property or pecuniary advantage by deception under sections 17 and 18 of the TO;
 - v. offences relating to documents, such as forgery under section 71 and copying, using, using a copy of or possessing a false instrument under sections 72, 73, 74 and 75 of the CO;
 - vi. offences related to technology, such as altering or erasing data which constitutes destroying or damaging property under section 60 of the CO or accessing a computer with criminal or dishonest intent under section 161 of the CO; and
 - vii. any person who aids, abets, counsels or procures the commission by another person of any offence, is guilty of the underlying offence under section 89 of the Criminal Procedures Ordinance (Cap. 221).
- Additional offences may also be found in

the Securities and Futures Ordinance (Cap. 571), Companies Ordinance (Cap. 622), Telecommunications Ordinance (Cap. 106) and Inland Revenue Ordinance (Cap. 112).

In Hong Kong, there are also various civil causes of actions which are available to a party who is a victim of fraud, such as:

Proprietary claim based on constructive trust

This allows a defrauded party to obtain relief in equity by claiming that the fraudster held the fraudulently obtained assets on constructive trust in favour of the defrauded party, and therefore the fraudster is held to account as a constructive trustee.

Third parties may also be liable if they are sufficiently implicated, in that they knowingly received fraudulently obtained assets.

Proprietary claim based on unjust enrichment (money had and received)

This allows a defrauded party to claim that the fraudster was enriched at the expense of the defrauded party in circumstances which are unjust, such as where there is a total failure of consideration or a mistake of fact or law.

Tort of conspiracy

Where a defrauded party's interests were injured by use of unlawful means (i.e. fraud) by two or more persons who conspired together to do so, the defrauded party may bring a tortious claim of conspiracy against the fraudsters.

The defrauded party does not need to show there was actual damage or that damage was the main purpose, just that the intention of the conspiracy was to cause damage to the defrauded party.

Fraudulent misrepresentation

Where a fraudster has made a representation knowing it to be false or without actual belief in the truth of the representation (i.e. recklessly) and a defrauded party relies on the representation and suffers loss as a result, a defrauded party may bring a tortious claim of deceit based on fraudulent misrepresentation.

As a spring board for the civil claims that a victim can launch, there are a variety of orders which may be sought in the interim that allow for the freezing of assets, such as bank accounts, and tracing and discovery of assets which victims can look towards.

Norwich Pharmacal order

An order against a third party for disclosure of documents and information which allows the defrauded party to trace the passage of

information or assets prior to starting proceedings against the fraudsters. The disclosure is generally restricted to information which allows the defrauded party to identify and go after the fraudsters.

This principle was established in the English case *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133 and has been applied in Hong Kong repeatedly.

A banker's trust order

A form of relief derived from the English Court of Appeal's decision in *Bankers Trust Company v Shapira* [1980] 1 WLR 1274 which is essentially an NPO directed at third-party banks or professional advisers. This order directs them to provide information which enables tracing of assets but which normally is protected by confidentiality.

Disclosure has been extended by the Hong Kong Courts to discovery of bank books and other documents including bank statements and account opening forms.

Bankers' records/books order

Any party to any legal proceedings may apply to the Court, under section 21 of the Evidence Ordinance (Cap. 8) ("EO"), for an order that a bank allow that party to inspect and take copies of its records/books for the purposes of discovery.

The disclosure is generally limited to documents necessary for the purpose of those particular proceedings.

Mareva injunction

This is a freezing order which a defrauded party may apply to the Court for in order to prevent a fraudster from dealing with, moving or disposing of assets. Courts in Hong Kong apply the principles set out in the English case *Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213.

A freezing order can apply to all asset classes including, but not limited to, property, bank accounts, shares, account receivables and chattels.

Such an order can restrain fraudsters from dealing with their Hong Kong assets only (domestic *Mareva*) or can prevent fraudsters from dealing with assets outside Hong Kong as well (worldwide *Mareva*).

An order is also binding on third parties who are served with the order; therefore, it is common to serve such orders on banks at which the fraudsters have accounts in order to get those accounts frozen.

Hong Kong Courts may also enforce worldwide *Mareva* injunctions obtained overseas in Hong Kong by getting a local domesticated equivalent injunction order under section 21M of the High Court Ordinance (Cap 4) (HCO). ➔

➔ **Anton Piller order**

This is a search and seizure order to assist with the preservation of documents. This order will allow the defrauded applicant to enter the premises of the fraudster – search for and remove documents relevant to the applicant’s case.

Prohibition against debtors from leaving Hong Kong

A defrauded party which has a judgment in its favour – therefore a judgment creditor – may apply to the court for an order to prevent a debtor fraudster from leaving Hong Kong to another jurisdiction. Armed with a prohibition order which has been served on the Immigration Department, the fraudster would be stopped from departing Hong Kong at check points pursuant to Order 44A of the Rules of the High Court (Cap. 4A).

The Prohibition Order is usually valid for one month, and renewable for two further one-month extensions.

Interim attachment of property

Where a defendant fraudster in an action is about to dispose of property or (any part thereof) with the intent of obstructing or delaying the execution of any judgment, a defrauded party may apply to court for an order that the fraudster furnish security which would be enough to satisfy any judgment that may be given against the fraudster pursuant to Order 44A of the Rules of the High Court (Cap. 4A).

With all of the cases coursing through the Hong Kong Courts, there is no lack of cases illustrating the effectiveness of Hong Kong’s system.

CXC Global Japan Kabushiki Kaisha v Kadima International Ltd [2019] HKEC 3988: this is a typical email fraud case which illustrates the main stages of fraud, asset tracing and recovery.

The defrauded plaintiff is a Japanese company and the two defendants are Hong Kong companies which maintained bank accounts with OCBC Wing Hang Bank Limited (OCBC). The plaintiff was duped into transferring US\$108,632.50 into the defendants’ bank accounts in the belief that the instructions were for a merger and acquisition planned by the chairman of the group of companies the plaintiff belonged to – this is an illustration of your typical CEO fraud.

The plaintiff obtained proprietary and *Mareva* injunctions, as well as bankers’ books orders, against both defendants. Pursuant to the bankers’ books orders, the plaintiff obtained account statements and transaction records of both defendants’ accounts.

The plaintiff filed a writ of summons and then sought, by way of summons, a default judgment against the defendant, as well as to join OCBC to

seek a vesting order for the sum of US\$108,632.50.

The second defendant was absent from the summons hearing. Default judgment was obtained against the first defendant and the court found that the sum of US\$90,000 in the second defendant’s OCBC account was held on constructive trust for the plaintiff, thus OCBC was ordered to pay that sum to the plaintiff.

The effectiveness of the Hong Kong system can particularly be seen with regards to how it handles new challenges, such as the general increase in online business fraud, email fraud and investment fraud cases in recent years.

Hong Kong courts have shown an increased willingness to assist victims of such frauds, notably by granting declaratory relief to victims at an interlocutory stage of proceedings, without trial.

Recently, in *Skandinaviska Enskilda Banken S.A v Hongkong Liling Trading Ltd* [2018] HKCFI 2676, a victim of email fraud claimed that the funds the defendant had defrauded from it were held on trust for the victim by way of a proprietary constructive trust.

The court granted default judgment along with a declaration that the defendants held the funds on trust for the plaintiff.

While the Court noted that “a court will not normally make a declaration without a trial”, it viewed there was a genuine need for declaratory relief in which “the practice will give way to the requirements of justice”.

The same reasoning has been followed in a number of other recent first-instance judgments in the High Court and the District Court.

In another recent case, *Terence John Stott v Larks Trading Ltd* [2019] HKCFI 1317, the victim of a fraudulent investment scam brought a claim based on proprietary constructive or resulting trust and seeking default judgment. The Court again granted the victim declaratory relief without a trial.

Does the regime go far enough in the pursuit of fraudsters and the recovery of stolen assets?

In other jurisdictions, courts and regulators have sought to share the burden with the banks opening these accounts, but in Hong Kong, it seems that one can still open a bank account with a shelf company with relative ease and facility. Hence fraudsters are still able to open bank accounts which act as recipient accounts for proceeds of fraud. Notwithstanding the foregoing, the banks in Hong Kong still require very stringent risk assessment of the information they collect and the individuals whom they allow to open bank accounts, to fulfil their AML requirements,



whether under individuals' names or corporate accounts; otherwise, Hong Kong will continue to remain an attractive jurisdiction for would-be money launderers.

2 Case triage: main stages of fraud, asset tracing and recovery cases

Main stages of how fraud, asset tracing and recovery cases are approached in Hong Kong

Early steps: contacting law enforcement, banks involved and engaging lawyers

Contacting law enforcement: defrauded parties may look to the Hong Kong Police Force and other authorities such as the Joint Financial Intelligence Unit (JFIU) (which is jointly run by officers from the Hong Kong Police Force and the Hong Kong Customs & Excise Department), the Commercial Crime Bureau, the Organized Crime and Triad Bureau or the Independent Commission Against Corruption. An online police report should be filed to register the fraud at the earliest opportunity.

The police may require the bank receiving fraudulently obtained assets to temporarily block any attempts to transfer or withdraw the assets.

At all times, the victim should first try to contact both the company's own outward remitting bank and the recipient bank to obtain information about the status of the transfer and the whereabouts of the funds being remitted.

Lawyers can also be retained to issue letters to the recipient banks to point out any potential criminal consequences of transferring or dealing with the funds which they know or suspect to be

the proceeds of crime (*section 25 of the Organised and Serious Crimes Ordinance*).

A letter to a bank which sets out details of the fraud and points out the potential criminal consequences of moving the funds may make a bank pause before honouring transfer instructions received from a fraudster, and buy time to freeze the money by other methods.

The police in both the jurisdiction of the outgoing funds and the jurisdiction to which the money has been transferred should also be alerted.

Commencing civil proceedings, which may be done together with tracing and identifying assets and freezing or restraining assets (explained further below):

Once the defrauded party's money has arrived at a local bank account, there is no means by which the recipient bank would voluntarily reverse the transaction. Hence the defrauded party should commence private civil proceedings in the Hong Kong courts against parties holding or having an interest in the assets/property sought to be recovered, namely the bank account holder in the case of a bank account fraud.

The most common relief sought for fraud is damages, although other remedies such as equitable relief (e.g. a proprietary claim based on constructive trust) may also be sought.

Tracing and identifying assets

The defrauded party should make sure that there are identifiable assets/property in Hong Kong which may be restrained or confiscated, as authorities in Hong Kong cannot act on any request to restrain or confiscate assets which does not identify particular assets/property.

The relationship between the identified assets/property and the defendants should also be shown →

- ➔ and established. If the assets/property are held by third parties, then one must establish the basis upon which confiscation is sought.

The defrauded party may also need more information or evidence about the assets/property of the fraudster. Aside from searching public resources, such as the Land Registry or the Companies Registry, and the statutory rules in Hong Kong on the discovery and inspection of documents for parties to civil proceedings, the defrauded party has the option of making applications for discovery orders such as *Norwich Pharmacal* orders, banker's trust orders or bankers' records/books order under section 21 of the EO.

These are important for acquiring information or evidence about fraudsters, or the fraudster's assets from third parties.

Freezing or restraining assets under a court application for an injunction

There are various forms of interim relief available to restrain fraudsters from dealing with, moving or disposing of assets, such as obtaining a *Mareva* injunction or an *Anton Piller* order as discussed above.

A hearing for such interim relief may be obtained at short notice and is heard *ex parte*, and the court will issue the freezing order if it is satisfied that the required conditions for making the order are met. The initial order to freeze assets is an interim order for a limited period only and parties will be given time to effect service of the order and related documents on the defendant fraudster(s) and other affected parties, such as banks.

Parties will then get a return date to go back to court, at which point they will need to provide to the court evidence that service on the defendant fraudster(s) and other affected parties was effected. The defendant fraudster(s) and other affected parties may appear at this hearing.

If the defendant fraudsters and other affected parties do not appear, normally the court will grant a continuation of the freezing order "until further order of the court" so it will remain effective until the proceedings are complete.

Recovering assets and enforcing judgments

Once assets have been frozen in Hong Kong, the proceedings will need to continue to be litigated, as frozen assets cannot be recovered until the defrauded plaintiff has obtained a final judgment and executed on the judgment.

In cases where the defendant fraudster(s) does not participate in the civil proceedings and fails to file an acknowledgment of service of a defence – as is common in email fraud cases – the defrauded plaintiff can obtain a default judgment (judgment



without a trial) against the defendant fraudster(s).

Obtaining a summary judgment – where the defendant has no defence to the claim – is generally not available to plaintiffs where their claim is based on an allegation of fraud as the court has no jurisdiction to grant summary judgment in such cases.

However, in recent years there have been some cases where the fraud exception did *not* automatically apply where the facts of the case include fraud, but the defrauded plaintiff could show the claim would succeed even without proof of fraud.

For instance, in *Laerdal Medical Limited v Hong Kong Haocheng International Trade Limited* HCA 2193/2016, the plaintiff showed its case could succeed based on unjust enrichment without proving fraud. The court also additionally found, for various reasons, that the defendant's "defence is hopeless".

Types of relief after successfully obtaining a judgment include:

1. *Mareva* injunctions in aid of enforcement;
2. the appointment of a receiver;
3. examining the judgment debtor(s) (who were the fraudster defendants), if available, on oath in order to identify the whereabouts of the assets of the judgment debtors; or
4. discovery or disclosure of documents against third parties.

There are a variety of methods for enforcing such judgments, such as garnishee proceedings and charging orders.

Garnishee proceedings are against a third party, typically the local bank with which the defendant fraudster has an account containing



3 Parallel proceedings (a combined civil and criminal approach)

There are no restrictions on civil proceedings progressing in parallel with criminal proceedings on the same subject matter. A combined civil and criminal approach occurs frequently in Hong Kong; however, not at the request of the victim but rather at the discretion of the Police. Once a party has been defrauded, there is much advantage to be gained from reporting the fraud online as described above. With that report, it is hoped that the Police will get involved to impose and issue a ‘letter of no consent’ to the bank, informing the bank that the Police do not consent to their handling or dealing with the fraudster’s account. The JFIU would determine whether such a letter should be issued. Having said that, however, this is not something that the victim of a fraud can ‘order’ or insist that the Police do, and if the Police do issue such a letter then the victim can save on legal fees as the bank account will be frozen without a court order.

The Police may have powers to freeze a bank account much more quickly by issuing a ‘letter of no consent’, and it is possible that the police may assist in recovering stolen funds or even carry out the recovery process themselves.

The ‘letter of no consent’ procedure in Hong Kong:

- i. When fraud is reported to the JFIU, including as a suspicious transaction report (STR), the JFIU issues a “letter of no consent” to a bank. This means that JFIU does not consent to the bank dealing with the funds in the account.
- ii. Section 25A of the Organized and Serious Crimes Ordinance (Cap. 455) (OSCO) requires a person (an “informant”) to disclose his/her knowledge or suspicion that any property represents the proceeds of crime to the JFIU. If the JFIU gives the informant consent to deal with the property, the informant does not commit an offence under section 25 if they deal with the property.
- iii. If the JFIU does not give consent to the bank to deal with the property (the “no consent” regime), the informant or bank cannot deal with the property because this will constitute a criminal violation of section 25.
- iv. However, section 25A(2)(a) and the “no consent” regime does not operate to withhold or freeze the accounts or property of a suspect. It only creates a defence for further dealings with the property after disclosure.
- v. It remains for financial institutions to decide whether to honour the instructions of their

the fraudulently obtained assets. A garnishee order attaches the debt claimed to be due and accruing from the garnishee to the judgment debtor, i.e. money in the judgment debtor’s bank account, and will require the bank to pay the money directly to the defrauded plaintiff as part of the execution of a judgment obtained by the defrauded plaintiff.

Where the defendant fraudster has assets, such as landed property, securities or funds in court, the defrauded plaintiff can try to obtain a charging order to impose a charge over those assets. This provides the defrauded plaintiff with security, though further action would have to be taken to realise those assets.

Other options, depending on the circumstances, include writs of *feri facias*, writs of sequestration, winding-up proceedings or bankruptcy proceedings and orders for committal.

What are the benefits to this system and are there any difficulties?

Generally speaking, the Hong Kong legal system and its courts are well-equipped to deal with disputes and cases which result from fraud and also provide relief to those parties who have fallen victim.

However, the process discussed above does take time, and if the various orders discussed above are not obtained quickly enough, particularly to freeze misappropriated assets in the fraudster’s bank accounts, it is likely the fraudster will have already transferred those assets elsewhere (usually out of the jurisdiction) (discussed further in section 4 below).

- ➔ customers despite their suspicion and the disclosure.
- vi. If, on the other hand, the Police do not issue the ‘letter of no consent’, the victim of the fraud is left with having to run into court to apply for typically a *Mareva* injunction to prevent further dissipation and a banker’s records order to trace the funds, thereby having to incur legal fees.

Note on criminal proceedings in Hong Kong: For serious offences – which likely includes matters relating to fraud – there is no formal time limit for the commencement of a prosecution; in contrast to minor ‘summary offences’, which generally have a six-month limitation period starting from the commission of the offence (section 26 of the Magistrates Ordinance (Cap. 227)).

Benefits of the combined civil and criminal approach

Apart from civil causes of action and court orders that may be granted in civil proceedings, with respect to criminal matters, law enforcement agencies have certain powers to gather evidence and identify, trace, and freeze proceeds, while certain other actions to restrain and seize assets lie with the prosecutor.

The Hong Kong Police Force acts pursuant to the Police Force Ordinance with respect to evidence-gathering procedures and seizure of suspected property. Prosecutors will likely have the benefit of receiving evidence gathered by law enforcement. In particular circumstances, they may pursue their own applications to the court for evidence-gathering orders. The Police, however, do not share results of their investigations with the public and hence victims of fraud cannot rely on this as a resource for their civil claims.

Under section 15 of OCSO, a prosecutor may move for the restraint of assets or property to prohibit a defendant that has benefited from an offence specified under the ordinance – including those arising from fraud – from dealing with any realisable property. Where such a restraint order is in place, the court may appoint a receiver to take possession of any realisable property or otherwise manage or deal with such property. In addition, an authorised officer may also seize restrained property to prevent its removal from Hong Kong.

Section 16 of OSCO allows for the prosecutor to apply to the court for a charging order on realisable property, which has the effect of securing payment to the Hong Kong government backed by the property charged.

In any event, a discontinued or failed criminal prosecution is not a bar to civil action in Hong Kong since the standard of proof in civil proceedings is lower than in criminal proceedings.

The difficulties as mentioned above are that a victim of a fraud cannot expect to work in tandem with the Police, or rely on Police investigations to assist in the recovery of the funds, but rather must spend legal fees in its effort to recover the funds. The chicken or egg situation prevails because, at all times, victims would want to have certainty of recovery before deciding to spend good money after bad. To this extent, the legal practitioner is not in a position to advise with any certainty of outcome.

Civil fraud claims must be brought within six years from the date on which the cause of action accrues. This period does not begin until the defrauded plaintiff discovers the fraud or could, with reasonable diligence, have discovered it.

Plaintiffs, however, cannot act against an innocent third party who purchased the property for valuable consideration and without notice of the fraud, i.e. the defence of *bona fide purchaser for value without notice* prevails. In other words, at the time of the purchase, where the third party did not know or have reason to believe that a fraud had taken place.

4 Key challenges

Banks have contractual duties to their customers, which usually include the duty to honour any instructions to transfer funds out of a bank account before any injunction order is granted by the court and/or any action is taken by the authorities.



Given also that it can take time to communicate the details of a fraud to the right person in a large banking organisation and to persuade them to take action, it may be that a recipient bank can do, or will do, nothing to stop further transfers of the monies.

It can take time to communicate the details of a fraud to the right individual in a large banking organisation and to persuade them to take action, so it may be that a recipient bank can do, or will do, nothing to stop further transfers of the monies promptly.

The defrauded monies may have been transferred out of the bank account of the fraudster defendant.

The defrauded monies may also have been transferred out of jurisdiction; if the defrauded monies have been transferred to the People's Republic of China, it would be particularly difficult to recover the same.

Furthermore, commencing civil proceedings and taking out the interlocutory applications mentioned earlier in this chapter can come with a significant legal cost and there is no guarantee that the defrauded party will recover all, or even any, of their money.

5 Cross-jurisdictional mechanisms – issues and solutions in recent times

Most frauds now span multiple jurisdictions and often the cross-border litigators may need to cooperate and be involved or mobilised with

despatch quickly to try and arrest the funds.

Given that Hong Kong is an international hub where the incorporation of private limited companies is inexpensive and relatively easy and banks are accustomed to customers dealing in large amounts of money, Hong Kong is a popular destination for fraudulently obtained funds to be transferred to, particularly in email fraud cases.

In August 2015, the United States' Federal Bureau of Investigation (FBI) reported that the majority of wire transfers in fraud cases involving business email compromises were going to Asian banks located within Hong Kong and China.

In July 2018, the FBI reported again that Asian banks located in Hong Kong and China remained the primary destinations of fraudulent funds where wire transfers were made pursuant to business email compromises/email account compromises.

The mechanisms in place for effective tracing of assets cross-jurisdictionally

Criminal proceedings

Article 96 of the Basic Law provides that with the assistance or authorisation of the Central People's Government, the Hong Kong Government may make appropriate arrangements with foreign states for reciprocal juridical assistance.

There are also several multilateral agreements which apply to Hong Kong which provide for mutual legal assistance in criminal matters. Hong Kong also has bilateral mutual legal assistance agreements with 30 other jurisdictions as of November 2018.

As a matter of common law, the Hong Kong Police can exchange information with and release information to law enforcement bodies in other jurisdictions (such as the FBI) for intelligence and investigation generally.

The Hong Kong Police also has mutual assistance arrangements with enforcement bodies of other countries where assistance is required across jurisdictions for situations such as the obtaining of information for use in a prosecution or the production of materials relating to a criminal matter from the party in possession or control of those materials. Such a request will be dealt with under Hong Kong's mutual legal assistance framework and be processed under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO).

The MLAO was enacted so that Hong Kong's law enforcement authorities could work with their counterparts abroad in investigating and prosecuting criminal offences. It provides for a variety of legal assistance available which is important in the context of asset tracing.



➔ Under the MLAO, the Secretary of Justice of Hong Kong may provide assistance to another jurisdiction or make requests to another jurisdiction for assistance of the types set out in the MLAO. These include:

1. taking and production of evidence;
2. search and seizure;
3. production of material;
4. transfer of persons to give assistance in relation to criminal matters;
5. confiscation of proceeds of crime; and
6. service or certification of documents.

These types of assistance allow Hong Kong to work with other jurisdictions to get orders to trace assets, such as by getting a bank to produce documents, as well as to freeze or confiscate assets.

Where the jurisdiction making a request to Hong Kong does not have a bilateral agreement with Hong Kong, that jurisdiction will need to provide a reciprocity undertaking. Otherwise, Hong Kong will refuse such a request.

However, section 3 of the MLAO specifically provides that it does not apply to the provision or obtaining of assistance in criminal matters between Hong Kong and any other part of the People's Republic of China.

Parts VIII and VIII A of the Evidence Ordinance (Cap. 8) (EO) also provide that the court of first instance in Hong Kong has the power to assist in obtaining evidence for criminal proceedings in an overseas court, as well as the power to order that a letter of request – a formal written request – be issued to an overseas court to assist in obtaining evidence for criminal proceedings in Hong Kong.

Civil proceedings

Part VIII of the EO provides that the Hong Kong courts have the power to assist in obtaining evidence for civil proceedings in overseas courts.

Order 70 of the Rules of the High Court (Cap. 4A) (RHC) then provides the framework for the Hong Kong courts to obtain evidence for overseas courts pursuant to Part VIII of the EO or pursuant to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention), which Hong Kong is a contracting party to. The Hague Evidence Convention provides a mechanism for the 61 states which are contracting parties to obtain evidence located overseas by issuing a letter of request.

Letters of request (also known as letters rogatory):

A foreign defrauded party may get the judicial body of the overseas jurisdiction in which they commenced proceedings to issue a 'letter of request' to Hong Kong courts for assistance in

obtaining evidence in civil proceedings. The jurisdiction of Hong Kong courts to do so is provided under Part VIII of the EO.

A Hong Kong court may also issue a letter of request to foreign courts to acquire evidence from parties out of the jurisdiction based on the Hague Evidence Convention.

Where a letter of request is from a foreign country which is not a party to the Hague Convention, it can still be recognised even though no convention is in force. The language of Part VIII of the EO is wide enough to provide for requests from states which are not parties to the Hague Evidence Convention (*Order 70, Rules of the High Court*).

While China is also a contracting party to The Hague Evidence Convention, it does not apply between Hong Kong and China since they are two jurisdictions within the same state.

Hong Kong and China separately entered into the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region, which came into force on 1 March 2017.

This arrangement assists parties to proceedings in Hong Kong and China in obtaining evidence in civil and commercial matters with greater efficiency and certainty.

Foreign defrauded parties may also freeze and realise proceeds of fraud in Hong Kong by way of Section 21M of the High Court Ordinance (Cap. 4) (HCO):

Under Section 21M of the HCO, the Hong Kong court has the jurisdiction to grant interim relief in relation to proceedings which have been or are to be commenced in a place outside of Hong Kong and are capable of giving rise to a judgment which may be enforced in Hong Kong.

This may provide a way for overseas victims of fraud which have identified assets belonging to the fraudster in Hong Kong to obtain interim relief, such as a *Mareva* injunction, in respect of those assets. The overseas victim may then continue pursuing their proceedings overseas without having to conduct concurrent proceedings in Hong Kong.

6 Technological advancements and their influence on fraud, asset tracing and recovery

While the integration and use of artificial intelligence (AI) in the legal sector in Hong Kong is in its early days, law firms in Hong Kong are increasingly welcoming and embracing the use of technology in providing legal services.



This is likely to be the trend for most, if not all, law firms in Hong Kong in the next few years. So far, the legal sector has largely integrated and utilised technology, including AI and machine learning, in areas such as e-discovery, due diligence, contract review and repetitive document management exercises, as those are areas where the volume of data and/or documents can be so massive that human review is either almost impossible or exceedingly difficult or not cost-effective. Use of technology to assist makes it faster, more accurate and more cost-effective to carry out such tasks.

Hong Kong has also seen various start-ups take integration of technology into the legal sector beyond just large-scale document review and management, such as:

- i. the Hong Kong-based Zegal, which offers cloud legal software solutions for both law firms and businesses by simplifying the search for legal documents and automating the legal document drafting process; and
- ii. the not-for-profit Electronic Business Related Arbitration and Mediation, also known as “eBRAM”, which is developing a new online platform for dispute resolution in which users can go through negotiation, mediation and arbitration entirely online and AI will facilitate deal-making on this platform. This was formed with the support of the Law Society of Hong Kong and the Hong Kong Bar Association.

However, there are not yet any specific examples of technology being used by Hong Kong’s legal sector to aid fraud, asset tracing and recovery in Hong Kong, save for individual service providers’ own search engines.

The advancement of technology vs the difficulties of asset traceability?

An example of a situation in Hong Kong where tracing assets was made more difficult due to the advancement of technology is the launch of the Faster Payment System (FPS) in September 2018 in Hong Kong.

FPS is a real-time payment system introduced by the Hong Kong Monetary Authority and operated by Hong Kong Interbank Clearing Limited to allow for immediate fund transfers and retail payments between consumers and merchants. All banks and e-wallet operators in Hong Kong can participate in the FPS.

However, soon after the launch of the FPS, fraud cases involving the FPS cropped up as a result of fraudsters stealing personal and bank account information of victims, then using this information to open up fake e-wallets and then stealing money from those victims’ bank accounts using the fake e-wallets.

Real-time transactions leave more room for fraud because unlike traditional payment methods which take more time to go through, making payments through systems like the FPS are immediate and irreversible. Therefore, once your money is gone, it is essentially gone for good.

As for cryptocurrencies and virtual assets generally, with the rapid development of virtual assets, frauds related to virtual assets have also risen.

Hong Kong turned into a flourishing market for cryptocurrency exchanges and initial coin offerings (ICOs), given that its rules on virtual currencies are less strict than those in China, where ICOs and cryptocurrency exchanges have

- ➔ been banned since 2017 (and now essentially all crypto-related commercial activities are banned).

By February 2018, however, the Securities and Futures Commission of Hong Kong (SFC), the statutory authority in Hong Kong which regulates the securities and futures markets, announced that they had received several complaints from cryptocurrency investors against issuers of ICOs alleging “unlicensed or fraudulent activities” or that cryptocurrency exchanges had “misappropriated their assets or manipulated the market”. The SFC also received complaints from investors who claimed they were unable to withdraw fiat currencies or cryptocurrencies from accounts they opened with cryptocurrency exchanges.

In a number of other circulars, the SFC urged investors to be careful of the heightened risk of – among other problems – fraud when investing in cryptocurrencies and ICOs.

Given that such investments, along with the use of cryptocurrency exchanges, occur online, a victim of fraud may have trouble pursuing fraudsters if those fraudsters are not physically present in Hong Kong.

SFC also flagged that it may not have jurisdiction over issuers of ICOs or cryptocurrency exchanges if “they have no nexus with Hong Kong or do not provide trading services for cryptocurrencies which are ‘securities’ or ‘futures contracts’”.

Further, since digital tokens involved in ICOs are transacted or held on an anonymous basis, they pose inherent risks.

The SFC also noted that these technological advancements were causing an increase of intermediaries who were starting to provide asset management services involving virtual assets.

The SFC publicly expressed concern about virtual asset portfolio managers and virtual asset trading platform operators in November 2018, as these portfolio managers and platform operators may not carry out enough due diligence before they invest in a certain virtual assets or allow a virtual asset to be traded on their platforms. Therefore, investors may end up being defrauded and lose their investments.

How has the law kept up with these advancements or is it lagging behind?

Since Hong Kong is still in its early days of seeing the impact of technological advancements on issues such as fraud and also utilising technological advancements in the legal sector, there has not yet been much visible influence on the law.

However, statutory bodies such as the SFC have worked to address issues which have come up so far, such as to try to bring virtual asset portfolio managements into the SFC’s “regulatory net”

For instance, on 1 November 2018, the SFC

announced a “conceptual framework for the possible regulation of virtual asset trading platforms” and subsequently met with virtual asset trading platform operators in Hong Kong to explain the SFC’s regulatory expectations.

The SFC decided that it would be appropriate to regulate certain types of centralised platforms trading security and non-security virtual assets and published a framework for doing so in a Position Paper published on 6 November 2019. Where virtual asset trading platforms are able to meet the SFC’s regulatory standards (which are similar to those for licensed securities brokers), the SFC will grant a licence to those platforms and regulate them under the SFC’s existing powers.

However, the SFC pointed out in this paper that the SFC does not have the power to grant licences to or oversee trading platforms which only trade non-security virtual assets.

Furthermore, the parts of the Securities and Futures Ordinance (Cap. 571) which enable the SFC to take action against market misconduct in the securities and futures markets will not apply to licensed virtual asset trading platforms because, at the end of the day, they are still not a recognised stock or futures market and the virtual assets are not “securities” or “futures contracts” listed or traded on such a market (*paragraphs 1 to 9, SFC Position Paper on Regulation of virtual asset trading platforms*).

In 2018, the SFC also ordered a Hong Kong-based ICO issuer Black Cell Technology Limited (Black Cell) to halt raising capital through an ICO and return all digital tokens to investors, as Black Cell’s activities may qualify as a “collective investment scheme” that would require the SFC’s approval to market or sell to the general public.

7 Recent developments

There has been an increase in the use of “mule” bank accounts in Hong Kong for moving money obtained by way of fraud.

These mule bank accounts have other trading purposes and became an issue where the beneficiary of the subject bank accounts argued that they received the funds of the defrauded party as a ‘bona fide purchaser’ and should be entitled to keep those funds.

Hong Kong saw a spate of these cases, such as *Laerdal Medical Limited v Hong Kong Haocheng International Trade Limited* HCA 2193/2016 (mentioned above), where the defendant claimed it had received funds from the defrauded plaintiff as consideration for a business transaction, which was a shipment of ladies’ shoes from a company in Mainland China. However, the Hong Kong

court found that the defendant had a hopeless defence considering, among other factors, that the defendant had no contract with the defrauded plaintiff but the defendant's own banking documents showed the funds were credited in favour of the defendant by the plaintiff.

Similarly, in *Ferrari North America, Inc v Changbon International Energy Co. Limited and Others* HCA 862/2017, an email fraud case where the plaintiff was lured into paying US\$6.7 million into the defendant's Hong Kong bank account. Part of this sum was transferred onward to other defendants and one of these defendants claimed it had received part of the funds as part of its "bona fide arm's length dealings" to buy frozen meat products from suppliers. In this case, the Hong Kong court found enough issues with the defendant's evidence to raise a suspicion of dishonesty – such as the defendant's sales confirmation being inconsistent with its other sales confirmations and the defendant's bank documents showing that it had no normal commercial banking or business-related activities at the time of the fraudulent transfers – and accordingly continued the

injunction which the plaintiff had applied for to freeze the funds.

8 Conclusion

The landscape is ever evolving for this particular area of the law, and law enforcers and the courts can hardly keep up with some of the new and crafty ways fraudsters operate. Experience, exposure and public knowledge are certainly assets as most fraudsters will have a tried and true *modus operandi* whilst many victims are still not wary or vigilant enough to alert themselves to suspicious circumstances and are too quick to make assumptions of good faith and regularity.

Reform may be needed in banking governance and account opening vigilance so that fraudsters do not have the benefit of hiding behind the veil of privacy and restitutionary steps may be taken once any fraud is detected.

Cross-border sharing of information and skills will also help in fast-tracking any relief for the defrauded victims. 🚗



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